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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
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Review of the Commission's	)	
Regulations Governing Program	)	MM Docket No. 95-92
Practices of Broadcast Television	)	
Networks and Affiliates	)	
	)	
47 C.F.R. §§73.658(a), (b), (d), (e) and (g)	)	

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REPLY COMMENTS OF
THE WARNER BROS. TELEVISION NETWORK

THE WB TELEVISION NETWORK

Diane S. Killory
Joyce H. Jones
MORRISON & FOERSTER
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006-1888
(202) 887-1500

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REPLY COMMENTS OF
THE WARNER BROS. TELEVISION NETWORK

Pursuant to the Notice of Proposed Rulemaking ("NPRM") released by the Commission on June 15, 1995 in the above-captioned proceeding, The Warner Bros. Television Network ("The WB") hereby submits these Reply Comments.

INTRODUCTION

The Commission has proposed to eliminate or modify a number of network/affiliate rules. In our opening Comments, The WB addressed four of these rules -- the exclusive affiliation, time option, right to reject and territorial exclusivity rules. While we supported some of the Commission's proposed changes, we opposed repeal or relaxation of the exclusive affiliation and time option rules. Because preservation of these two rules, at least in the near term, is absolutely essential to the commercial viability of incipient networks like The WB, we focus on these two rules in our Reply Comments.

The purpose of this proceeding is to determine whether the network/affiliate rules "continue to serve the purposes for which they were developed."[1] The objectives of the rules, the Commission observes, are two-fold: (1) to remove barriers to the development of new networks; and (2) to ensure that licensees retain a level of programming control sufficient to permit them to fulfill their obligation to operate in the public interest.[2]

As the Comments filed with the Commission in this proceeding demonstrate, the exclusive affiliation and time option rules have worked in tandem to achieve these goals. Most importantly, by making entry into the provision of network television possible -- first by ABC, then by Fox, and most recently by The WB and UPN -- the rules have increased competition significantly.

In the NPRM, the Commission expresses concern that while the rules have promoted competition, they may also have had an adverse effect on economic efficiency. The Commission recites the standard litany on the economic benefits of exclusive dealing, and theorizes that this analysis may apply to network television.[3] ABC, CBS and NBC (collectively, the "major networks") enthusiastically embrace this possibility in their Comments, but offer no evidence to show that this economic theory translates into commercial reality in the broadcast marketplace. Thus, on the record of this proceeding,

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[1] NPRM at ¶ 5.

[2] *Id.* at ¶ 6.

[3] *Id.* at ¶ 36.

the benefits of eliminating (or significantly relaxing) the exclusive affiliation and time option rules are speculative and unquantified.

In contrast, the demonstrable costs of eliminating or modifying the exclusive affiliation and time option rules are tangible and significant. The Fox experience has taught the major networks that competition from new entrants, while beneficial for viewers, can ultimately prove quite painful for incumbent firms -- particularly after the new entrants gain a foothold in the marketplace. Consequently, as the Commission recognized, the "existing networks will have an incentive to block entry by new networks in order to maintain their existing market positions."[4] If the Commission allows networks to enter into exclusive affiliation agreements, either outright or through the back door via time options, it will give these incumbent firms the tools they now lack to prevent the development of competition from new networks. The WB and UPN, two networks that entered the marketplace this year, have shown in their Comments that their very survival -- at least in the near term -- depends on their ability to enter into secondary affiliation agreements. Eliminating (or significantly relaxing) the exclusive affiliation and time option rules will put these affiliations, and the networks themselves, at risk.

When the loss of direct competition from two new networks is weighed against the ephemeral efficiency gains hypothesized by the major networks, there is no justification for modifying, let alone eliminating, the exclusive affiliation and time option rules. This is not to say that the rules must be preserved in perpetuity. In a television marketplace in which the means of distribution are not constrained by technological and

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[4] *Id.* at ¶ 19.

regulatory factors (and in which, consequently, there is no concern that entry will be foreclosed by exclusive agreements), such rules are unnecessary. This is *not* the television marketplace of today, however. Preserving the rules at this time is necessary to prevent the foreclosure of competition from The WB and UPN. Once technological or regulatory advances have eliminated existing constraints on distribution, the Commission can reconsider these rules. If the Commission answers the major networks' call for deregulation now, however, it will simply be providing these rivals with the means to eliminate the enhanced competition they fear and understandably would prefer to avoid. That result is decidedly antithetical to the public interest.

I. THE EXCLUSIVE AFFILIATION RULE REMAINS VITAL TO THE SURVIVAL OF NEW NETWORKS

A. Without The Exclusive Affiliation Rule, New Networks Will Be Foreclosed From Critical Secondary Affiliations

As The WB stressed in its initial Comments, secondary affiliations are an essential building block for any incipient network. In the early years of the ABC network, ABC's secondary affiliates outnumbered its primary affiliates by more than two to one.[5] Similarly, when Fox entered the broadcast marketplace, it relied extensively on secondary affiliates to obtain national coverage.[6] It is thus no surprise that The WB and UPN, like ABC and Fox before them, are likewise critically dependent on secondary affiliations in their quests to attain sufficient national reach to compete for national advertising dollars. Indeed, because of the

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[5] H.R. Rep. No. 1297, 85th Cong., 2d Sess. 215 (1958)("Barrow Report").

[6] Geoff Foisie, *The Reach of Fox: Almost a Network*, Broadcasting, Jan. 28, 1991, at 42. In addition, in some markets Fox was forced to rely on cable carriage to achieve market penetration. Like The WB and UPN, Fox viewed cable as its choice of last resort. *See infra* note 13.

limited number of television outlets, the challenge of launching a network -- and attaining the requisite national reach -- becomes more daunting for each successive new network.

To be sure, new networks overwhelmingly prefer viable primary affiliates to secondary ones. Thus, as stations became available to ABC and Fox on a primary basis, they quickly affiliated with those stations. Similarly, The WB and UPN both have sought out primary affiliations before settling for secondary ones. The fact remains, however, that a new network cannot be built today with primary affiliations alone.

The major networks all argue in their Comments that the greatly increased number of independent broadcast stations in the market obviates the need for secondary affiliations for new networks.[7] The bare numbers alone, however, do not tell the whole story. Nor, more importantly, do they paint an accurate picture. The WB would much prefer that the major networks' rosy picture was reflective of reality. Indeed, if there were a sufficient number of viable stations available for primary affiliation, the newest entrants to the network business would not be asking the Commission to preserve the rules preventing exclusivity. Quite simply, the exclusive affiliation rule would not matter if there were no need for dual affiliations. The facts, unfortunately, are very different.

The truth is that even if a fifth network could affiliate with every available, viable station in the country, *the network would only have slightly more than 70 percent coverage nationwide*.[8] This number is necessarily lower for a sixth network. Because national advertisers, the source of network revenues, require at least 80 percent national coverage

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[7] ABC Comments at 10-11; CBS Comments at 29-30; NBC Comments at 35-36.

[8] UPN Comments at 18.

before they will purchase advertising, the level of coverage afforded by the viable, available broadcast stations nationwide is wholly insufficient to attract these crucial advertisers.[9] A fifth network -- let alone a sixth -- is thus not economically viable without secondary affiliations.

The major networks argue that given the proliferation of alternative video distribution outlets, including low power television stations, cable, DBS and other non-broadcast outlets, new over-the-air television networks no longer need to rely on secondary affiliations with broadcast stations for access to viewers.[10] These alternative outlets, the major networks suggest, will enable new television networks to form even in the absence of independent television stations.[11] Simply stated, however, these alternative video outlets are not remotely equivalent substitutes for free, over-the-air television as means of distribution for a new television network.[12] Low power stations, by definition, have extremely limited coverage potential. In addition, neither DBS nor cable, as discussed further below, provide sufficient audience access, or potential ratings, to support network-quality programming.

1. DBS Is Not A Viable Substitute For Secondary Affiliations

The major networks' reliance on DBS perhaps best demonstrates the fallacy of their argument that alternative video distribution outlets are adequate substitutes for over-the-air affiliates. DBS has a *national* footprint. It is not, and lacks the capacity to be, a local

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[9] UPN Comments at 14, n. 18.

[10] ABC Comments at 11; CBS Comments at 31; NBC Comments at 35-36.

[11] *See, e.g.,* ABC Comments at 21.

[12] UPN Comments at 6, 11-12.

service -- and therefore does nothing to help The WB build a network of strong local affiliates. The major networks blithely ignore this underlying characteristic of free, over-the-air television service when they suggest that DBS somehow ameliorates the negative repercussions that will ensue if they are able, through exclusive contracts, to shut their newest competitors out of the marketplace for over-the-air network television.

What is at issue here is not whether The WB could offer a program service distributed via DBS (or cable) to paying subscribers. What is at issue here is whether entities like The WB will have the opportunity to compete against the established networks (ABC, CBS, NBC *and* Fox) by developing a new, over-the-air broadcast television network, with original primetime network-quality series, that is available to all television households. If the exclusive affiliation rule is repealed, this opportunity will be foreclosed.

2. Cable Is Not A Viable Substitute For Secondary Affiliations

The WB and UPN have both explained that supplementing coverage via cable is a new network's choice of last resort.[13] The major networks, in contrast to their contentions in this proceeding, have acknowledged frankly in other proceedings that cable carriage, particularly The WB's cable carriage via WGN, is not a comparable alternative to broadcast affiliations. In the *Network Economists' Report*, filed on May 17, 1995 by the major networks in conjunction with the Commission's review of the broadcast ownership rules, the networks made the following observation about The WB's cable coverage:

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[13] The WB Comments at 4; UPN Comments at 12, n. 14. When Fox launched its network, it also used cable as a last resort. Indeed, Fox included provisions in its cable agreements that permitted it to terminate the agreements if broadcast affiliates became available. Matt Stump & Patrick J. Sheridan, *Fox & TCI: The Crossover to Cable*, Broadcasting, Sept. 10, 1990, at 23. Since then, Fox has substantially reduced its reliance on cable affiliations. Steve McClellan, *Fox's Latest Four Add Up to 96%*, Broadcasting & Cable, Apr. 18, 1994, at 16.

> . . . 21% of WB's schedule airs over cable which limits reach and penetration in those markets . . . . Unless WB can replace WGN with over-the-air broadcast stations which cover an entire market, its ratings potential and growth will be limited. *Since there are a finite number of local stations available, both UPN and WB are at a distinct disadvantage.*[14]

Indeed, ratings generated by WGN on cable are not at all comparable to the ratings of local WB affiliates. For example, in St. Louis, the local WB affiliate recently earned a 4.6 rating during The WB primetime feed. WGN, by contrast, earned a .2 rating that same evening.[15]

In addition, cable carriage is an inadequate means of filling a new network's coverage gaps because one third of all households (*i.e.*, 35 million households) do not subscribe to cable, and instead depend on free television as their sole access to the video marketplace.[16] As a result, the ratings available from cable are not comparable to those available from a network broadcast. This, in turn, means that cable earns lower advertising revenues. Indeed, the advertising revenues are reduced even further by the fact that the advertising rates (CPMs) are lower for cable than over-the-air television.[17] The result is that cable supports a different

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[14] *An Economic Analysis of the Broadcast Television, Local Ownership and Radio Cross-Ownership Rules,* Vol 2., App. H at 32 (citing Media Edge Feb. Report) (emphasis supplied), submitted in MM Docket No. 91-221 (May 17, 1995)("*Network Economists' Report*").

[15] *Nielsen Station Index, Household Rating Sign-on/Sign-off (Monday - Sunday 6:00A - 2:00A)* Sept. 1995. The major networks themselves recognize the superiority of distributing programming via the broadcast networks compared to cable. In the *Network Economists' Report,* the major networks provide example after example of the demonstrated dominance of broadcast networks over cable. For example, ABC claims to have 98 percent coverage as compared to the 66 percent coverage of its closest cable rival, CNN. Similarly, among 18-49 year olds, ABC claims to have a 7.7 primetime rating versus ESPN and TBS's 0.8 ratings. *Network Economists' Report*, Vol. 2, App. I; *see also, id.* at App. L, *ABC Puts Cable in Focus* (further documenting the disparities between network television and cable).

[16] UPN Comments at 12 n. 14.

[17] The CPMs are lower than over-the-air television for both cable networks and national superstations.

kind and quality of programming.[18] Ultimately, the only way to compete directly against the established television networks is by building a network of over-the-air affiliates.

Relying on cable affiliates is particularly difficult for a new network that is rolling out its schedule. The local cable operator is obviously not going to agree to carry a new network's programs that airs only a limited number of hours per week unless it has programs to air during the remainder of the time. Few cable systems, however, program their own channels. For this reason, The WB relies on WGN's superstation. Fox entered into an agreement with TCI, shortly after it launched its network, to fill in its white areas.[19] And UPN has no cable affiliates.

The hollowness of the major networks' assertion that cable affiliations are a viable alternative for new networks is demonstrated by their own conduct. It is hardly coincidence that not a *single* affiliate of the major networks is a cable channel. When CBS recently lost numerous affiliates to Fox, it did not turn to cable or other non-broadcast outlets for new affiliates. Rather, it turned exclusively to other over-the-air stations. In Detroit, for instance, CBS turned to UHF channel 62 rather than a cable affiliate.[20] Now that NBC has recently lost its primary affiliation with channel 40 in Binghamton, New York to Fox, it will be telling to see if NBC turns to a cable affiliate. There has been no suggestion that it will even consider such an alternative.

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[18] The major networks similarly recognize the disparity in cable programming. As the networks' economists have told the Commission, "[T]he larger cable networks provide mostly mass appeal fare -- much of it reruns off the Nets." *Network Economists' Report*, Vol. 2, App. H at 36.

[19] Matt Stump, *supra* note 13, at 23.

[20] *Nielsen Station Index, Household Rating Sign-on/Sign-off (Monday - Sunday 6:00A - 2:00A)* Jan. 1995.

The fallacy of the network argument is also demonstrated by CBS's argument that new networks can use cable to access their audiences,[21] when in the next breath CBS emphasizes the importance of networks in providing "*free access* to first-quality television programs."[22] CBS is not alone among the networks in presenting this dichotomy of views. The major networks' economists have together cited with approval Chairman Hundt's own statements about free, over-the-air television:

> Free, over-the-air television . . . is something that I think is part of our national community, and it helps to weave the fabric of our national culture together.[23]

The WB simply cannot offer millions of viewers a competitive alternative to the major networks if it is forced to rely on cable distribution.

3. Secondary Affiliations Are Indispensable To The Economic Viability Of New Networks

The major networks are the only parties in this proceeding that support repeal or relaxation of the exclusive affiliation rule. The two new networks, the independent stations, the public interest groups, and, indeed, the major networks' own affiliates all favor preservation of the rule. The reason is clear. Absent the rule, the established networks can use exclusive affiliation agreements to eliminate the new networks' secondary affiliations. Without secondary affiliates, The WB's over-the-air coverage drops to approximately 60

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[21] CBS Comments at 31.

[22] *Id.* at 17 (emphasis supplied).

[23] *Network Economists' Report*, Vol. 2, App. H, at 4.

percent, while UPN's coverage drops to 72 percent.[24] Thus, without secondary affiliates, neither new network can attract national advertising and thereby sustain itself in the long run.

Secondary affiliations, it must be emphasized, are particularly important at this time, with the Commission's February 25, 1994 freeze on comparative television license applications in effect.[25] In Reply Comments submitted to the Commission on August 22, 1994, The WB explained to the Commission that the freeze was having a deleterious impact not only on prospective licensees but also on The WB.[26] As we explained, The WB's strategy for gaining a nationwide network necessarily includes relying on new stations for primary affiliations in a number of markets. Many of these new stations are currently caught in the freeze. Preservation of the exclusive affiliation rule, therefore, is particularly important until the constraints that limit the number of stations available for affiliation are removed by technological or regulatory developments.[27]

B. The Competitive Benefits Of Preserving The Exclusive Affiliation Rule Outweigh Any Arguable Costs

The Comments filed by the major networks echo the concerns raised by the Commission about the economic efficiency effects of the exclusive affiliation rule. The

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[24] UPN Comments at 4.

[25] *FCC Freeze in Comparative Proceedings*, 9 FCC Rcd. 1055 (1994).

[26] The WB Reply Comments in Comparative Broadcast Hearings at 2-3 (Aug. 22, 1994).

[27] The ability to squeeze more stations into the spectrum currently allocated to broadcast television depends on elimination of both adjacent and co-channel interference. Technological advances in television sets have essentially solved the problem of adjacent channel interference. While co-channel interference remains a problem today, careful technical innovation and design could solve the problem on a market-by-market basis. In addition, digital technology could solve the problem altogether, as is becoming evident during the extensive testing and analysis performed in conjunction with high definition television.

networks assert that the rule creates "free-rider" problems, and discourages networks and affiliated stations from investing incrementally in network "brands."[28] They offer no evidence to support these assertions, however, nor do they in any way attempt to quantify whatever efficiency loss they believe flows from the rule.

It is far from clear that any of the efficiency effects that the major networks ascribe to the rule do, in fact, exist. ABC simply asserts that the rule creates a situation in which "an affiliate of an established network *could* take advantage of the audience drawn to the station by virtue of that network's popular programming to build audience for a second network's competing programs."[29] CBS similarly asserts that a station "*may* find [broadcast of another network's program] to be more profitable in a particular instance."[30] Neither offers any evidence, however, to support these assertions. In point of fact, the "free-rider" effects that the major networks describe are likely to be symmetrical. Specifically, when a dual affiliate builds a larger audience for itself by airing the "more profitable" programs of a second network, that larger audience is likely to redound to the benefit of the first network as well.

CBS argues that exclusive affiliations should be regarded as "unexceptional," analogizing television stations to McDonald's franchises. "No one," CBS says, "would expect McDonald's to allow its franchisees also to sell pizza supplied by a third party."[31] But the reason this is so is because a third party wishing to sell pizza can readily build or lease a

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[28] NBC Comments at 38; ABC Comments at 20; CBS Comments at 29.

[29] ABC Comments at 20 (emphasis supplied).

[30] CBS Comments at 29 (emphasis supplied).

[31] *Id.*

pizza parlor. If The WB could affiliate with television stations as easily as Domino's Pizza affiliates with new franchisees, we would not be advocating retention of the rule. The fact remains, however, as discussed above, that technological and regulatory constraints significantly limit the number of stations available for affiliation.

NBC casts its argument differently, claiming that the rule reduces the networks' incentive to "brand themselves" and compete through differentiation.[32] Again, however, no evidence is offered to support this assertion. And while it is possible that the major networks could heighten their "brand" recognition through additional investment, the competitive benefits of such investment are, as a theoretical and evidentiary matter, speculative and unquantified on the record of this proceeding.

Even assuming arguendo that repeal of the rule would have the efficiency benefits that the networks hypothesize, however, the Commission must weigh those benefits against the anticompetitive consequences of taking such action. The record demonstrates that it is highly unlikely that The WB and UPN will survive in the absence of secondary affiliation agreements. This marketplace reality is plainly one that has not been lost on the major networks, which have seen Fox use such secondary affiliations to build itself into a formidable competitor. Exclusive affiliation agreements are, quite simply, a means by which the major networks can (and will) impede entry into network television, thereby effectively foreclosing direct competition from firms like The WB. Indeed, the use of exclusive

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[32] NBC Comments at 38.

distribution agreements and other forms of vertical integration to engage in such anticompetitive strategic behavior has been widely recognized in the economic literature.[33]

ABC acknowledges the concern "that exclusivity arrangements between networks and their affiliates could be abused to foreclose emerging networks," but argues that this concern "is adequately addressed by the availability of antitrust law remedies."[34] This argument is particularly ironic coming from ABC, which relied on the exclusivity rule -- not the antitrust laws -- to build its incipient network through secondary affiliations. As ABC well knows, new networks cannot rely on the antitrust laws alone, for not all anticompetitive conduct can be adequately remedied under those laws.[35] At best, an antitrust suit by a new network against one or more incumbent networks would take years to resolve, at a significant cost to all concerned, with no assurance that a court's favorable judgment would ever be able to restore the market to the status quo ante. Indeed, it is precisely because the antitrust laws alone cannot be relied upon to ensure that the public interest in competition and other important values, such as broadcast diversity, are adequately protected that Congress has subjected certain industries -- including broadcast television -- to governmental regulation.[36] Where, as here, a long-standing Commission rule continues to serve the public interest in

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[33] *E.g.,* Michael Katz, *Vertical Contractual Relations,* in Handbook of Industrial Organization (R. Schmalensee & R. Willig eds., 1989); F.M. Schere & D. Ross, *Industrial Market Structure and Economic Performance* 558-64 (3d ed. 1990); Eric Rasmussen, J. Mark Ramseyer and John S. Wiley, *Naked Exclusion,* 81 American Economic Review 1137 (1991).

[34] ABC Comments at 22.

[35] *Theatre Enterprises v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954).

[36] *See,* S. Breyer, *Regulation and Its Reform* 15-20 (1982).

competition and diversity by providing the opportunity for new entrants to establish themselves in the marketplace, it should be preserved.

It is conceivable, of course, that eliminating the exclusive affiliation rule would not only reduce competition in network television by driving The WB and UPN from the marketplace, but also achieve some or all of the efficiency benefits the networks describe. Even assuming arguendo that this is the case, the Commission must balance these costs and benefits in deciding whether to preserve the rule. The evidence shows that the loss of competition if the rule is repealed will be immediate, significant, and assured. The efficiency benefits that may be realized from repeal, on the other hand, are both uncertain and unquantified. On the record of this proceeding, the balance tips heavily in favor of preserving the rule.

This is not to say that the exclusive affiliation rule must be preserved in perpetuity. It is conceivable that technological, regulatory or marketplace changes in the future will significantly reduce or eliminate the need for new networks to rely on secondary affiliations. When such developments come to pass, the Commission can reconsider the rule without any concern that its action will foreclose new entry into network television. At this juncture, however, when the competitive fate of two new entrants depends so critically on the use of secondary affiliations, the Commission's mandate to protect the public interest in competition and diversity requires the Commission to preserve the exclusive affiliation rule.

C. Notwithstanding The Major Networks' Protestations To The Contrary, Their Affiliates Lack Sufficient Power To Resist Exclusivity

Increased affiliate power appears to be the battle cry of the major networks as they argue for elimination of all network rules. Despite the major networks' contentions, however, their affiliates have no confidence that they could resist the major networks' attempts to force exclusivity upon them. If they could, they would presumably prefer to have the flexibility to enter into exclusive contracts. Instead, without exception, the network affiliates are asking the Commission to restrict their bargaining freedom. This is telling evidence that the affiliates do not believe they could retain their freedom against the major networks.

Certainly, the existence of a newly emerging network with which a station can affiliate does not create a "powerful check on network bargaining power."[37] A dual NBC/WB affiliate, for example, would have little leverage with which to resist NBC's insistence on exclusivity. Stated differently, NBC is not very likely to take seriously a threat by the station to switch affiliations to The WB, which has almost 85 fewer hours per week of programming[38] and an 18 point lower average primetime share.[39] The fact is that *not a single affiliate of The WB has switched affiliations from ABC, CBS, NBC or Fox.*

CBS similarly argues -- equally unconvincingly -- that the availability of "original syndicated programming, as well as high quality programming from the new United Paramount and WB Networks, has clearly lessened any undue dependence" of network

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[37] ABC Comments at 6.

[38] The WB's program hours per week are based on The WB's current schedule for 1995. NBC's hours per week are based on the Nielsen Special Analysis, Nov. 1994.

[39] Electronic Media, Nov. 6, 1995, at 62.

affiliates upon their networks. While The WB wishes this were so, it is not -- at least, not now. The Association of Independent Television Stations ("INTV") and the Network Affiliated Station Alliance ("NASA"), which together represent virtually all of the affiliates of all of the networks, confirm The WB's view. INTV and NASA conclude that The WB and UPN are not in the same position as the established networks and thus "do not now offer a reasonable substitute for a major-network affiliation."[40] The networks' economists similarly agree, as stated in the *Network Economists' Report:*

> At this stage, these new "networks" are closer to syndicators than real networks. Both UPN and WB have limited clearances and their schedules do not run on the same day and time in every market.[41]

In short, it is highly unlikely that affiliates of the established networks will be able to resist their primary networks' demand for exclusivity if the Commission jettisons the exclusive affiliation rule at this time. A dual affiliate would have no choice but to succumb to the demands of its established primary network for exclusivity; it would not risk losing that network affiliation simply to accommodate a secondary affiliation with a new network.

D. Even In Large Markets, The Exclusive Affiliation Rule Remains Important To New Networks

The FCC has proposed eliminating the exclusive affiliation rule in large markets. While eliminating the rule in markets where it is no longer needed to ensure the availability of affiliates for new entrants has some theoretical appeal, the size of the market's population is not an appropriate measure to use in implementing this approach. Indeed, there are several

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[40] NASA Comments at 10 (citing National Economic Research Associates, Inc. study attached as exhibit 1 to their Comments); *see also,* INTV Comments at 3, n. 1.

[41] *Network Economists' Report,* Vol. 2, App. H, at 32 (citing Media Edge Feb. Report).

large markets (*e.g.*, Cleveland and St. Louis) in which The WB and UPN are forced to rely on secondary affiliations.

A better measure would be the number of viable, full-power stations that are available for primary affiliation in a market. Repealing the rule in those markets in which there are as many such stations as networks (whether established or prospective), however, while consistent with the Commission's goal of preventing anticompetitive behavior, has administrative problems of its own. Determining the appropriate definition of a viable station would be an arduous task. Moreover, even if the Commission took a "snapshot" of the affiliate alignments as they exist today, and eliminated the exclusive affiliation rule in those markets where no dual affiliations exist, that "snapshot" of the current market would account neither for future affiliate switches[42] nor, more importantly, for any new networks that will need secondary affiliations in order to have any chance at commercial success.[43]

The WB can envision a day when we might stand to gain, as an established network, if we could avoid competition from new entrants by entering into exclusive affiliation agreements. We also concede, however, that The WB's gain in that case would be *in*consistent with the public interest. The Commission's role, of course, is to foster the public

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[42] There are still some markets, for example, where The WB may need to enter into, and indeed is considering, secondary affiliations in order to obtain coverage.

[43] It is widely speculated, for example, that Barry Diller intends to use the 12 UHF stations owned by Silver King Communications, in which he recently purchased a controlling interest, as a springboard for a seventh television network. *See* Joe Flint, *Diller to Head HSN with Vision of New Network,* Daily Variety, Nov. 27, 1995, at 1; Geraldine Fabrikant, *Diller Gets Nod to Head Network-in-Waiting*, N.Y. Times, Aug. 26, 1995, at 33; Richard Brunelli, *And Then There Were . . . Seven? Barry Diller Seeks to Create a Seventh Television Network,* Mediaweek, Sept. 4, 1995, at 9; Timothy J. Mullaney, *Diller Taking Aim at Networks*, Baltimore Sun, Oct. 22, 1995, at 1D.

interest. It can fulfill that mandate here by preserving the opportunity for new network entry by both today's struggling incipients and tomorrow's new entrants.

It is noteworthy, in this regard, that had the Commission actively considered repealing this rule ten or even fifteen years ago, it might have eliminated the rule on the assumption that the marketplace would never support more than three networks. Indeed, when the Commission's Network Inquiry Special Staff ("NISS") recommended that the Commission eliminate the exclusive affiliation and time option rules in 1980, its conclusion was premised, among other things, on the logic that deterring entry by new networks could not be a plausible objective of the major networks in their affiliation practices, inasmuch as there was no potential for new networks to develop. The NISS described the prospects for a "fourth full-time advertiser-supported network" as "not very great," "not bright" and "so remote."[44] Fortunately, the Commission did not heed the NISS recommendation because Fox, The WB or UPN would never have been formed, just as ABC would not have been formed before them, without the rule in place.

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For all these reasons, and especially in light of the fact that two new networks are currently dependent on secondary affiliations as they try to establish themselves in the marketplace, this is the *worst* possible time for the Commission to eliminate the exclusive affiliation rule.

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[44] Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation,* Final Report, Vol. I at 140, 483 (Oct. 1980).

II. THE TIME OPTION RULE REMAINS NECESSARY TO THE SURVIVAL OF NEW NETWORKS

If the Commission were to retain the prohibition against exclusivity, but eliminate the time option rule, networks would be able to achieve exclusivity through the back door by optioning time. Specifically, if the established networks were allowed to option available affiliate air time, they could simply option the remainder of the broadcast day, in much the same way that the CBS and NBC radio networks did at the time of the *Report on Chain Broadcasting*.[45] The practice of time optioning would effectively foreclose the availability of the secondary affiliations that are vital to the creation of new networks. Accordingly, for all the reasons set forth in Section I above, the time option rule should be retained.

There is no significant cost to retaining the rule. Even with the rule in place, networks have a substantial amount of flexibility in planning their program line-ups. A number of networks (including The WB) have agreed, for example, to program their affiliates' air time on a phased-in basis. This arrangement, permissible under the Commission' rules,[46] affords The WB the flexibility it needs as a new network. The WB does not need, however, to option all of its affiliates' air time, as would be permitted if the Commission eliminated the time

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[45] *Report on Chain Broadcasting,* Commission Order No. 37, Docket No. 5060, at 37 (May 1941), *modified, Supplemental Report on Chain Broadcasting* (Oct. 1941), *appeal dismissed sub. nom. NBC v. United States,* 47 F. Supp. 940 (S.D.N.Y. 1942), *aff'd,* 319 U.S. 190 (1943).

[46] To the extent CBS intimates that The WB's affiliation contracts currently provide for some form of time optioning, it is wrong. *See* CBS Comments at 28, n. 64. The WB's affiliation contracts, like a number of other network affiliation contracts (including the Fox agreements that have been filed with the Commission for years), do not implicate, let alone violate, the time option rule. In its affiliation agreements, The WB "agrees" to utilize specified portions of their affiliates' air time as The WB rolls out its line-up of programs. Time optioning is not implicated because there is no contract or agreement that "prevents or hinders the station from scheduling programs *before the network agrees* to utilize the time." 47 C.F.R. § 73.658(d)(emphasis supplied). By the Commission's own definition, therefore, The WB is not engaging in time optioning.

option rule (or, as noted above, as the CBS and NBC radio networks did before the rule was adopted). In any event, any incremental benefit created by the ability to option all of an affiliate's time is far outweighed by the cost of enabling the networks to evade the exclusive affiliation rule. Indeed, it is difficult to fathom why the established networks would now want to option time that they have previously not found the need to program, unless it is to use that option as an offensive sword against entry by new networks.

Time optioning, moreover, should be prohibited for *all* networks. The WB agrees with UPN that "the notion that an emerging network could use time-optioning offensively, in an entry-deterring manner, against *established* networks, is at once amusing and economically untenable."[47] Nevertheless, The WB is concerned that UPN will use time optioning to deter the entry of The WB -- not an established network, but another *new* entrant seeking secondary affiliations with UPN affiliates.

UPN supports elimination of the time option rule for emerging networks because its secondary affiliations are only with established networks. UPN's proposed modification of the time option rule thus ensures that UPN's development cannot be hindered through the offensive use of time optioning by the primary networks of UPN's secondary affiliates.
The WB similarly wants to limit the ability of its secondary affiliates' primary networks to impede if not foreclose The WB's access to air time on those affiliates. Because The WB has secondary affiliations with affiliates of both the established networks and UPN, however, this can be accomplished only if the rule is retained for all networks. The WB and UPN are thus

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[47] UPN Comments at 31 (emphasis supplied).

consistent in their desire to prevent the abuse of time optioning as an offensive mechanism to limit new network access to air time.

As with the exclusive affiliation rule, the FCC might consider eliminating the time option rule in those markets where there is no need for secondary affiliations. Again, however, for the reasons discussed above, drawing this line would be an exceedingly difficult task. Moreover, as with the exclusive affiliation rule, a rule based on a current "snapshot" neither provides flexibility for recent entrants to add secondary affiliations as needed nor accounts for other potential new networks entrants. Because increased network competition ensures increased viewer choice, The WB and UPN -- like the established networks -- should not be immune from competition from additional entry. To ensure competition and diversity in the provision of network television, therefore, the Commission should keep the time option rule in place at this time.

CONCLUSION

For all the reasons set forth in these Reply Comments and in our opening Comments, this is the worst possible time for the Commission to eliminate or substantially relax the exclusive affiliation and time option rules. While technological or regulatory changes may eventually make these rules obsolete, that day has not yet arrived. In today's marketplace, two struggling new networks will not survive unless they can obtain, and rely on, secondary affiliations. The established networks already have the *incentive* to foreclose these new entrants from the marketplace. If the exclusive affiliation and time option rules are eliminated, the Commission will have given the established networks the *ability* to foreclose competition as well. Because that result is unquestionably contrary to the public interest, the Commission should leave both of these rules in place at the present time.

Respectfully submitted,

Diane S. Killory
Joyce H. Jones
Morrison & Foerster
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006-1888
Telephone: (202) 887-1500

Counsel for The Warner Bros.
Television Network

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